IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1753 of 1987

with

CROSS OBJECTION No 335 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA
and
Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

THACKER NAROTTAM KALYANJI

Appearance:

1. First Appeal No. 1753 of 1987
   MR MD PANDYA for Petitioner
   MR CL SONI for Respondent No. 1
   NOTICE SERVED for Respondent No. 3

2. CROSS OBJECTIONNo 335 of 1998
   MR MD PANDYA for Petitioner
   MR CL SONI for Respondent No. 1
   NOTICE SERVED for Respondent No. 3

CORAM : MR.JUSTICE D.C.SRIVASTAVA

and

MR.JUSTICE H.K.RATHOD

Date of decision: 17/02/2000

CAV JUDGEMENT (per D.C.Srivastava, J)

This appeal and the cross objection arising out of the same accident involving common questions of law and fact are proposed to be disposed of by a common judgement.

2. The appeal has arisen from the judgement and award dated 19.4.84 of Motor Accident Claim Tribunal, Kutch at Bhuj awarding Rs.1 Lac as compensation for the death of Anilkumar aged about 20 years which occurred on account of the fatal accident between the bus of the appellant and the scooter driven by the deceased together with 6% p.a. interest with proportionate costs. The cross objection has been filed by the claimants-respondents claiming that the compensation awarded by the Tribunal is less and Rs.1 lac more should be awarded over and above the compensation awarded by the Tribunal and the interest be enhanced to 12% p.a. with costs throughout and the First Appeal of the appellant under consideration be dismissed.

3. The brief facts giving rise to the appeal and cross objections are as under:-

Anilkumar aged about 20 years was a prospective industrialist and according to the claimants he would have earned Rs.3000/- p.m. w.e.f. 19.10.80 from the business he wanted to start viz. small scale industry in Mining, Minerals Grinding and Levigation of China Clay. On 15.7.1980 at about 9.45 a.m. Anilkumar was going on his scooter No. GJK 9146 towards Kukma on Bhuj Anjar Road. He was driving the scooter with moderate speed on the left side of the road. When he reached near Kukma the opposite party no.1 before the Tribunal, who was driving Bus No. GTE 5222 owned by the opposite part no.2 came from the opposite direction. The Bus was being driven in the middle of the road rashly, negligently and at an excessive speed. When the bus was at some distance from Anilkumar the driver gave side to another bus which came from behind. In these circumstances Anilkumar was not in a position to take his scooter to the extreme left side of the road. After giving side to another bus the driver did not take his bus to the left side nor did he slow down the speed & dashed his bus with the scooter of Anilkumar. The scooter as well as Anilkumar were dragged upto a distance of 200 feet from the site of collision.

Anilkumar sustained serious injuries and he died at the spot. The scooter was also reduced to scrap and became useless. All this happened due to rashness, reckless and negligent driving of the bus by the driver opposite party no.1. Anilkumar joined the course of Textile Technology but he was interested in setting up industry. Hence he left his studies and was preparing to commence the business of Mining, Minerals Grinding and Levigation of China Clay. On account of the accident he could not commence his business on 10.10.80. According to the claimants, who are parents of the deceased, Anilkumar would have earned atleast Rs.3000/- p.m. initially from the business and would have maintained himself and the claimants from his income. Average expectancy of life in the family of the deceased is 75 years. Out of the income of Rs.3000/- p.m. the deceased would have contributed Rs.2000/- p.m. for maintenance of the claimants for 25 years. The income of the deceased would have been increased after some time. In this way, the claimants suffered loss of Rs.6 lacs on account of premature death of the deceased. The scooter was also reduced to scrap. It was worth Rs.10000/- but it was sold for Rs.3000/- only and thus the claimants suffered a loss of Rs.7000/- on this count. Rs.10000/- were claimed for mental shock and suffering and Rs.5000/- for funeral expenses and other religious ceremonies. Thus out of the net claim of Rs.615000/-, the claimants restricted their claim to Rs.2 lacs.

4. The case of the appellant and the driver was that the bus was not being driven rashly and negligently, the manner in which the accident took place was stated in their written statement as follows:-

"The width of the road at the place of accident was 7.5 mtrs. The driver was driving the vehicle on his left side at a speed of 35-40 kms per hour. The deceased Anilkumar was coming on his scooter from opposite direction with excessive speed of 70 kms per hour. He was not having any driving licence at the time of accident. Anilkumar was driving in the middle of the road and seeing this, the driver of the bus took his vehicle more towards the left side and applied brakes and slowed down the speed considerably and also gave the horn, signal and light signal so that the scooter driver may take care of his scooter and move to the left and may not collide with the bus. However, the deceased did not listen to the signal nor did he lessen the speed of his scooter and ultimately collided head on

with the right side of the bus and headlight of the bus and bumper etc. were damaged. On account of this collusion the mudguard of the bus was dislodged, as a result of which the bus driver could not control the bus and it dragged the scooter as well as the deceased to the right side of the road where the driver could manage to stop the bus. According to these opposite parties, the accident took place due to reckless and negligent driving of the scooter by the deceased."

5. The claim of the claimants was said to be excessive. It was also pleaded that the scooter was old and its price was not worth Rs.10000/-.

6. The Tribunal found that the accident took place due to rash and negligent driving of the ST Bus No. 5222 by the opposite party no.2 and that the deceased was not guilty of contributory negligence. The Tribunal repelled the plea of the opposite parties that they are not liable to pay any compensation. Ultimately the Tribunal found that the claimants are entitled to Rs.100000/- as compensation to be paid jointly and severally by the two opposite parties. It is therefore this appeal and cross objection.

7. We have heard the Learned Counsel for the appellant and the respondent and also examined the record. There is no dispute regarding the date, time and place of accident. It is also on record that the width of the road at the scene of accident was 7.5 metres tar road and 6 ft kucha road on either side. Thus roughly the width of the tar road and kucha road included together came to 36 ft.

8. The claimants were not eye witnesses of the accident. To prove the manner of the accident they examined Mamaji Chandaji Jadeja. This witness has fully and correctly described the manner in which the accident took place. He was not a chance witness. On the other hand he was travelling in the same bus. He deposed that the driver was driving the vehicle in full speed in the middle of the road. He also stated that the scooter driver was coming from opposite direction at a slow speed. He confirmed the allegations in the claim petition that the bus driver gave side to another bus coming from behind and at that time the speed was slightly reduced and there was a sudden collision between the bus and scooter driven by the deceased. The bus stopped at a distance of about 150-200 ft from the place

of collision. The witness came down from the bus and saw that the scooterist was entangled below the road and front wheel of the bus and the scooter was also so entangled.Photograph at Exh.84 and 85 show that the statement of the witnesses is correct and not imaginary. The witness dragged the scooter and the deceased from below the bus with the help of 5 to 6 other passengers.

9. Learned Counsel for the appellant however argued that this witness was not present in the bus and that his statement does not inspire confidence. He argued that the bus ticket was not produced by the witness. This argument has little substance. A passenger travelling by bus cannot be expected to preserve his ticket. Even if some accident took place the the witness was not expected to preserve his ticket. It was next argued that this witness was not interrogarated by the Police in the criminal case. A criminal case was initiated against the driver. Ofcourse this witness was not examined in the Criminal Court. What emerges from the judgement of the Tribunal is that the witness was not examined and not that he was not interrogorated by the Police. The examination of the witness in the Court is one thing and interrogoration of the witness by the Police is another thing. Unless he was interrogorated his name could not have found place in the chargesheet. It was not necessary for the prosecution to examine all the eye witnesses. Moreover on this ground alone it cannot be said that the presence of this witness was highly doubtful. It was also argued by the Learned Counsel by the appellant that from the statement of appellant's witness Manhardas Popatdas Jarahati, Additional Asst. Engineer in the District Panchayat, it is clear that the claimant's witness Mamaji Chandaji was working under him and his presence was marked on 15.7.80 in the record and he was on daily wages and he was doing this work between 8.00 a.m. to 12.00 a.m. and 2.00 p.m. to 6.00 p.m. No doubt he brought the Muster Roll where payment of daily wage and attendance of Mamaji Chandaji is marked. It was thus argued by the Learned Counsel for the appellant that if the accident took place at 9.45 a.m. the witness Mamaji Chandanji was supposed to be on duty and as such he could not be present or travelling in the bus in question. The witness Mamaji Chandaji however stated in the cross examination that during his duty hours he occasionally used to come to Bhuj to report or to receive instructions from his office. The appellant's witness could not positively state in the cross examination whether Mamaji was on duty at his place of work on that date or not. If in these circumstances, if the Tribunal relied upon the statement of Mamaji Chandaji it cannot be

said that it committed any manifest error of law or proceeded on presumptions. It could not be shown that this witness was either related to the deceased or had any enmity with the appellant. Consequently he had no reason to give false statement. Moreover the claimants were not eye witnesses and as such they could not have produced imaginary and unconcerned witnesses. It is also not established that this witness Mamaji Chandaji is in any way interested with the claimants. If the witness was not interested with the claimants and his presence in the bus was not doubtful he was rightly relied upon by the Tribunal. If this witness could not produce the bus ticket it does not mean that he was not travelling in the bus. Regarding his non-examination in the criminal case as a witness he stated that though he was not examined in criminal case, yet he admitted that he was served with summons in the criminal case but he could not appear due to his ill health. It is thus difficult to say and accept that he was not interrogorated by the police during investigation. If he would not have been interrogorated his name would not have figured as a prosecution witness in the chargesheet. The driver opposite party no.1 himself admitted that he knew the witness Mamaji Chandaji since he appeared as an eye witness in the criminal case against him. This also confirms that Mamaji Chandaji was not imaginary witness. Thus from the statement of Mamaji Chandaji it is established that the accident took place on account of rash, reckless and negligent driving of the bus by the opposite party no.1.

10. The circumstances of the case also indicate that the bus was being driven at a high speed in rash and negligent manner. Mamaji Chandaji stated that the bus was being driven in the middle of the tar road. The width of the tar road was 7.5 mtrs which corresponds to approximately 24 feet. It is also in the claim petition as well in the statement of Mamaji that the scooter was coming from opposite direction and one bus was coming from behind the bus with which the accident took place and the driver of the appellant's bus gave pass to the bus coming from behind. Under these circumstances when two buses and a scooter were being plied on the same road it cannot be accepted that there was no obstruction to Anilkumar to drive his vehicle and in this situation he could not have driven towards the extreme left. One of the photographs shows that after being dragged about 190-200 feet from the scene of collision the bus and the scooter were lying entangled towards the extreme right side of the road. If the driver would have been careful in driving the bus he could have immediately stopped his

bus after the collision. He admitted that the bus had hydraulic brakes fitted in it and he also admitted that if hydraulic brakes would have been applied the vehicle would have stopped immediately. The collision took place from the right front side of the bus. The driver was sitting on the right side of the bus. As such it cannot be said that collision escaped the notice of the driver. If he saw collision he should have immediately applied the brake and not that he should have dragged the scooter and Anilkumar to a distance of roughly about 200 feet. That itself shows that the bus was driven at an excessive speed which could not be controlled by the driver even after collision. The statement of the driver that the brake became defective after collision cannot be accepted. If this would have been so then the technical examination report of the bus could have been filed as evidence from the side of the appellant which has not been done.. We are not impressed with the contention of the Learned Counsel for the appellant that 190-200 feet is nothing because the length of the bus was itself 60 feet. The reason is that the distance is to be measured from the front side of the bus and not from the back side of the bus in as much as the accident took place from the front side of the bus. As such if after noticing the collision if the driver dragged the scooter and the deceased to a distance of about 200 feet it can be said that he was rash and negligent in driving the bus.

11. It is difficult to believe the driver of the bus that he noticed that the scooter was being driven at a speed of 70 km. per hour.This is nothing but an imagination. Thus, in our opinion the Tribunal was justified in holding that the accident took place due to rash and negligent driving of the bus by opposite party no.1.

12. Learned Counsel for the appellant however vehemently argued that it was a case of contributory negligence. She argued that that looking to the width of the bus and keeping in view that the bus and scooter were coming from opposite direction it was the duty of the scooter driver to drive his vehicle towards the left and that since he did not take that precaution his negligence in driving the scooter cannot be ignored and he was also a party to the accident and as such it is a case of contributory negligence and not a case of absolute liability of the driver of the bus. It has come on record that the deceased was not having a driving licence. However, this factor alone cannot be sufficient for presuming that the deceased was driving the vehicle negligently or rashly. Instances are not rare where a

scooter driver fails to obtain licence or fails in getting driving licence renewed. There is no evidence from the side of the appellant that Anilkumar was driving the scooter and had no control over the same. If the statement of the driver is to be accepted that Anilkumar was driving the scooter at a speed of 70 kms per hour it can be said that no unskilled driver could have driven a scooter on highway at such an excessive speed. After all he should have been conscious of danger to his life if he was driving the scooter rashly and negligently more particularly if he was unskilled driver. Moreover, it has come in the evidence of the claimant that the deceased told him that he had obtained driving licence. Thus this cannot be a ground for holding that the deceased was guilty of contributory negligence. On the other hand, the claimants examined two witnesses to show that the deceased was good in driving the scooter. The applicant has also stated to the same effect. Dhirajlal and Abdul Latif are witnesses of the claimants who proved that the deceased had good knowledge of driving and was driving the scooter well at a controllable speed.

13. In Mahendrasingh Sohal Vs. Rameshkumar & Ors. 1981 ACJ 326, it has been observed that contributory negligence is not to be presumed merely from the fact that the driver did not hold a driving licence. It was further held that if the driver was driving the motor cycle with due care and caution in that case, it could not be held that he was liable for contributory negligence. In the case before us, the Tribunal found that there is no negligence on the part of the deceased. As such the plea of contributory negligence cannot be accepted. The Tribunal was therefore justified in rejecting the appellant's plea of contributory negligence of Anilkumar.

14. The Tribunal further considered the photographs Exh.83 and 84 and rightly concluded that the bus was on the wrong side and that the driver of the bus was rash and negligent in driving the bus. Exh.84, according to the Tribunal, showed that the bus was taken on the wrong side on account of which the accident took place.

15. Two cases were cited by the Learned Counsel for the appellant on the point of contributory negligence. IN Bhai Samshersingh V/s. Punjab State, 1993 AC 1309, the facts were altogether different. No doubt it was a case of head on collision between bus and car resulting in death of three occupants in the car, yet the evidence and photos indicated that the accident occurred in the middle of the road with neither the bus nor the car

giving way to each other. It was on these facts that it was held that both the drivers were negligent in causing the accident. In the case before us, the facts are altogether different. Here the accident took place on the right side of the road whereas the driver of the bus was expected to ply his bus on the left side of the road. Since a bus intervened which was coming from behind, it cannot be said that deceased Anilkumar had opportunity to give way to the bus driven by the opposite party no.1. Consequently this case stands distinguished on facts.

16. In Urmila and Anr. Vs. State of Haryana and Others, 1991 ACJ, 325, the collision took place between a scooter and bus coming from the opposite direction on a 100 feet wide road resulting in death of the scooterist and the pillion rider. There was evidence of the eye witnesses that the scooter was on the right side and the bus came on to the wrong side of the road at fast speed. The driver stated that he stopped the bus on the left side of the road. The scooterist came from wrong side at a high speed and struck against the front bumper of the bus. The Tribunal held that the accident was caused due to the sole negligence of the scooterist. In appeal it was observed that the road was wide enough to provide ample space for two vehicles without any obstruction. However it gives rise to presumption of negligence on the part of both drivers and it was held on these facts that both the drivers were actually to blame. This case is also distinguishable on facts. Here the road was 100 feet wide. Further there was evidence that the bus driver stopped his bus on the left side and the scooter came to the wrong side and struck against the front bumper of the bus. The facts before us are altogether different. The width of the road was only 24 feet. There is no evidence that the bus driver applied brake and the bus came to halt before the accident nor is there any evidence that Anilkumar was driving the scooter on the wrong side and he himself struck against the right side portion of the bus. Consequently the principles laid down in these two cases cannot be applied to the facts of the case before us.

17. In view of the foregoing discussions, we are of the view that the finding regarding negligence and rashness on the part of the driver recorded by the Tribunal requires no interference so also the finding recorded by the Tribunal that the deceased was not guilty of contributory negligence.

18. Then comes the quantum of compensation. According to the Learned Counsel for the appellant, the

quantum of compensation is excessive whereas according to the Learned Counsel for the respondent, who has filed counter claim, the compensation is on the lower side and atleast Rs.2 lacs should have been awarded as compensation. In the claim petition net compensation of Rs.615000/- was claimed but it was restricted to a claim of Rs.2 lacs only. This means that in all Rs.2 lacs were claimed in the claim petition as compensation. In the course of arguments, the Learned Counsel for the respondent contended that the Tribunal was in error in awarding interest at the rate of 6% p.a.. from the date of the application till payment. He has referred to the Apex Court judgement in Hardev Kaur Vs. Rajasthan State Transport Corporation, AIR 1992 SC 1261. In this case, the Tribunal awarded interest at the rate of 6% p.a. from the date of filing of application before the Tribunal till the date of realsiation. The Apex Court placing reliance upon earlier two decisions of the Apex Court in Chameli Wati Vs. Delhi Municipal Corporation, AIR 1986 SC 1191 and Jasbirsingh Vs. General Manager, Punjab Roadways, AIR 1987 SC 70 enhanced the interest from 6% to 12%. In view of these three decisions of the Apex Court, we are unable to agree with the contention of the learned Counsel for the appellant that the interest was rightly awarded at 6% and that award of interest was discretionary with the Tribunal. We are, therefore, of the view that the interest awarded by the Tribunal at the rate of 6% p.a. from the date of application till payment has to be enhanced to 12% p.a. from the date of application to the date of payment.

19. In the cross objection, it is mentioned that the Tribunal should have awarded compensation of Rs.2 lacs whereas the compensation of Rs.100000/- awarded by the Tribunal was itself argued by the Learned Counsel for the appellant to be excessive. Learned Counsel for the respondent further contended that the monthly income of the deceased was wrongly assessed by the Tribunal at Rs.2000/- p.m. and that in so doing the Tribunal has not kept in mind that the deceased aged about 20 years was to engage himself in two types of business, one was Mineral grinding and other was levigation of China Clay whereas the Tribunal has discussed only one proposed business of mineral grinding and omitted to consider the other proposed business for which papers were brought on record. In this way it was contended that the finding of the Tribunal is not based on consideration of entire documentary evidence on record. The distinction suggested by the Learned Counsel for the respondent regarding two types of business cannot be accepted. In the claim petition itself it is mentioned that the

deceased was prospective Industrialist and could have earned Rs.3000/p.m. w.e.f. 19.10.80. Thus the total income from the two proposed business of the deceased was assessed by the claimants at Rs.3000/- and not beyond that. Consequently, the claimants cannot be permitted to travel beyond their pleadings at this stage nor any evidence contrary to the pleadings can be admitted or accepted. If the total income of the deceased from the prospective business was disclosed in the claim petition at Rs.3000/-, it is difficult to accept that the deceased would have earned Rs.5000/- p.m. The Tribunal has given cogent reasons on the basis of evidence on record, that since the business was not running and it had not yet come into existence, the proposed monthly income at the initial stage could not exceed Rs.2000/-. In such a case where the business was not running and only proposals were made to start the business, the guesswork of the Tribunal cannot be said to be arbitrary. If the Tribunal instead of accepting Rs.3000/- assessed the income of the deceased at Rs.2000/- p.m., we do not find any error or arbitrariness in this assessment.

20. No hard and fast rule can be uniformly applied to all the cases of compensation arising out of the death of the deceased. The cases in which the men are engaged in service or professional skill are far easier to be dealt with because total average earning can be determined and also the dependency benefits. In the case of business flourishing and going on substantially if not wholly because of the business skill of the deceased do not present any difficulty. In a case like this whatever is earned by the deceased can be legitimately thought to be the outcome of the acumen of the businessman concerned but where the business was not commenced and it was proposed to be started it cannot be said in what manner the skill of the deceased was going to play part in successful running of such business. In ordinary business many factors contribute to make the business a successful going concern for example Capital, goodwill earned in the past, place of business and also the past factors of the business had to be taken into account. Business calibre of the deceased and proper supervision and control by the entrepreneur are very important factors in determining the income of the deceased. Consequently those who putforth claims arising out of the death of such businessmen should produce reasonable evidence on the record to show the nature of business, its dimensions, it potentialities & latent dangers and also the contribution of the personal skill of the businessman in mending and manning the business.

21. In Amina Khatoon Vs. Fakroo Shah, 23 (1) GLR 728, the deceased was one of the three pioneers of the business. He was actively participating in the day to day affiars of the business. He was a life force of the firm. He and his brother alone continued the business and developed it. His business acumen was therefore not underestimated. The profits of three years were considered and inference was drawn that there was more development and progress. On these facts, the loss to the dependants of Rs.500/- was considered by this Court to be quite ridiculous. In this case the deceased was aged about 41 years. He had two decades successful career behind his back and he was shown to be a man of active participation in the business. As such the net loss suffered by the Legal Representative of the deceased was enhanced to Rs.1100/-.

22. In the case before us, the business did not commence. Ofcourse the papers on record show that attempts were made for commencing the business. Consequently, there cannot be any direct evidence regarding net profits and monthly income from the business which would have been earned by the deceased. If the business did not commence the question of goodwill having been earned did not arise. The deceased was a raw hand. Of course he was young man aged about 20 years but there can be no presumption that he would have succeeded and flourished in his business. In this background the assessment of the Tribunal regarding monthly income of the deceased at Rs.2000/- as against the claim of Rs.3000/- per month set up by the claimants does not require any interference.

23. So far as the dependency benefits to the claimants are concerned, the Tribunal proceeded to calculate on the basis of their monthly income of Rs.2000/-. The Tribunal was of the opinion that the deceased would have kept Rs.500/- for his pocket expenses. This was quite reasonable amount because the deceased was a young man. Pocket expenses and petrol expenses for running the scooter could be included in this amount. Thus Rs.1500/were left, out of which the deceased would have utilised two-third of this amount for his maintenance. He was unmarried and he was likely to be married shortly and consequently expenses for himself and his family could have been 2/3rd and in this way 1/3rd i.e Rs.500/would have been given for maintenance of the claimants who are his parents. As such assessment of Rs.500/p.m. as loss of estate to the claimants cannot be said to be arbitrary. Multiplier of 15 times was also not arbitrary. We find no reason to accept the claim in

the cross objection that 30 times multiplier should have been applied by the Tribunal. The claimants reached the age of 57 and 54 years respectively. Thus, 15 times multiplier cannot be said to be arbitrary. In this view of the matter the claimants were entitled to Rs.90000/as compensation.

24. The Tribunal awarded conventional amount of Rs.5000/. This assessment is erroneous on the lower side. Keeping in view the young age of the deceased and the age of the claimants, the Tribunal should have awarded Rs.10000/- being the loss of estate to the claimants.

25. The scooter was totally damaged. According to the claimants the scooter was worth Rs.10000/-. It was rendered beyond repairs and it was sold for Rs.3000/only by the claimants. There is evidence on record from which the Tribunal found that the price of the scooter prior to accident could be somewhere between Rs.7500 to 8000/- and since it was sold at Rs.3000/-, the Tribunal rightly awarded Rs.5000/- as damages for the damage caused to the scooter.

26. In view of the aforesaid discussions, we find no merit in the appeal which is liable to be dismissed and is hereby dismissed with no order as to cost.

27. The cross-objections partly succeed. Since conventional amount has been increased to Rs.10000/- net compensation would now be Rs.105000/-. The amount of interest is also enhanced from 6% to 12% from the date of application till the date of payment. In view of success of cross objection, the award of the Tribunal is modified. The claimants are entitled to compensation of Rs.105000/- with interest at the rate of 12% from the date of application till payment with proportionate costs throughout. The amount shall be paid jointly and severally by the appellant and the respondent no.3.

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